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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 110

ALLEN POPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 34–38) is reported in 107 C. Cls. 463.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1946 (R. 39). A motion for new trial, filed by petitioner on January 29, 1947, was overruled on March 3, 1947 (R. 39). The petition for a writ of certiorari was filed on June 3, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the Court of Claims erred in holding that embankment excavation work, for which petitioner sought extra compensation, was within the coverage of petitioner's contract with the Government and that petitioner had been properly compensated for such work at the contract unit price.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and the specifications involved are set forth in the Appendix, *infra*, pp. 14–18.

STATEMENT

On June 8, 1938, the Navy Department, Bureau of Yards and Docks, advertised for bids for the extension of, and repairs to, an embankment behind a rifle range butt at the Naval Academy, Annapolis, Maryland (R. 25). The invitation contained a general description of the work to be done and stated that "approximately $2,500 is available for the work and the quantity of filling which will be done is dependent upon the unit price for the work" (R. 25). Bids were requested upon the following item (R. 26):

> *Item 1.*—Price per cubic yard, borrow pit measurement, for the fill in place, complete in accordance with the drawing and specifications.

Pursuant to this invitation, petitioner, on June 22, 1938, having inspected the site and become acquainted with conditions under which the work was to be carried out, submitted a bid of 20 cents per cubic yard for the work described in Item 1, *supra* (R. 26). Included in the bid was the statement: "It is a condition of this bid that not less than $2,500 will be paid" (R. 26). Petitioner's bid was accepted on June 25, 1938 by letter which stated in part: "The work under this contract contemplates the expenditure of approximately $2,500" (R. 26).

On June 27, 1938 petitioner entered into a contract to perform the above-described work (R. 26). Article 1 of the contract (Appendix, *infra*, pp. 14–15) stipulated that the work was to be performed for the consideration of 20 cents per cubic yard; that the contract contemplated the expenditure of approximately $2,500; that construction was to be in accordance with the specifications, schedules and drawings made a part thereof; and that it was to commence within 10 calendar days after receipt of notice to proceed, and was to be completed within 90 calendar days thereafter (R. 26).[1]

[1] The contract also contained three standard provisions: one authorizing the contracting officer to make changes in the drawings and specifications within the general scope thereof (Article 3); one providing that the contract might be modified should unknown or latent conditions be encountered which would materially affect the nature of the work (Article 4); and one establishing the contractor's right to appeal decisions of the contracting officer concerning disputes aris-

The specifications stated that no work was to be permitted at the site while firing was being done on the range at the times specified in the 1938 firing schedule attached thereto (R. 27). Provision was made for an extension of the completion date of the contract in the event the contractor was unable to work at the site because of firing at times other than those listed in the schedule (R. 27). Articles 2–02 and 2–05 of the specifications (Appendix, *infra*, p. 18) further provided that material for the embankment was to be excavated from two borrow pits; and that measurement of material, for purposes of payment, was to be made by the Government before and during the progress of the work, in the presence of the contractor or his representative if desired (R. 28).

The original drawings showed the dimensions of the embankment, its location,[2] and the location of the borrow pits (R. 28). They indicated that the embankment was to be constructed to an elevation of "±48.00" with slopes of 12:10 (R. 28). A notation read "These dimensions vary to suit elevation of existing ground" (R. 28). The court below found that "±48.00" meant 48 feet more or less (R. 28); and that, under the drawings

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ing under the contract to the head of the department (Article 15) (R. 3–4).

[2] Article 1–03 of the invitation (Appendix, *infra*, p. 14) stated that the exact location would be indicated by the officer in charge (R. 23).

and specifications, the amount of material necessary to build such an embankment and to perform the specified repair work was approximately 9,000 cubic yards (R. 29).

On August 31, 1938, petitioner received the notice to proceed, and began moving earth for the embankment (R. 28). This fixed the date for completion of the contract as November 29, 1938 (R. 28). Since the drawings had indicated approximately 9,000 cubic yards of fill, whereas petitioner's bid, at 20 cents per cubic yard, which specified an expenditure of approximately $2,500, contemplated that approximately 12,500 cubic yards would be excavated, some discussion took place between Navy Department officials and petitioner concerning the disposition of the excess material (R. 29). Subsequently, petitioner was advised that, in order to use the entire amount of money allotted for the project, he might raise the embankment approximately 7 feet, or so that its top would be at approximately elevation 55.00 (R. 29). In reply to this letter petitioner, on September 7, 1938, stated that the slope of the sides at this elevation would be too steep. Accordingly, he proposed that the excess earth be used to bring the top of the new embankment to elevation 50, and that the base be made broader, thus decreasing the slope of the sides (R. 29–30). On the next day, it was agreed that petitioner could proceed with the work on the basis of his September 7 proposal (R. 30).

Prior to the removal of any earth from the borrow pits, the Government took measurements of the material in place in accordance with Article 2–05 of the specifications; other measurements were taken at or about the time of the completion of the contract between December 18 and December 22, 1938, in order to determine the amount of material, for pay purposes, used in carrying out the work (R. 31). The taking of the measurements at the beginning of the job was observed by petitioner (R. 31). On the basis of the December 18 survey it was determined that 13,776 cubic yards of material had been excavated (R. 31–32).[3] On December 22, 1938, the officer in charge inspected the work and accepted it as completed under the contract requirements (R. 32).

On December 31, 1938, following receipt of the December 18 survey, petitioner informed the contracting officer that according to his computations[4] a total of 14,542 cubic yards had been

[3] Tentative measurements were made on September 30, October 31, and November 30, 1938, as a basis for progress payment vouchers. Petitioner accepted payment on the November 30 voucher but urged that more material had been removed than was indicated. The survey of December 18 was made at petitioner's request in order to determine what work had been done (R. 31).

[4] The Government determined that 13,776 cubic yards of earth had been removed by prismoidal formula. Petitioner's computation, which showed a total excavation of 14,542 cubic yards of earth, was based on the difference in ground elevations taken before commencement and after completion of the work (R. 32).

excavated (R. 32). Request was made for a 23-day extension and additional compensation of $3,255.17 (R. 32). The additional compensation was claimed on the grounds that there was an unreasonable delay in giving notice to proceed which projected the performance of the work into the winter with resulting increased costs; that there was an increase in the amount of work over the quantity estimated; and that latent conditions were discovered which differed from those contemplated by the original plans and specifications and which resulted in increased costs to petitioner (R. 32). The contracting officer, under date of April 21, 1939, issued a change order for additional work, the placing of 1,276 cubic yards of additional fill, and authorized an increase of $255.20 to the $2,500 payable under the contract (R. 32–33). The extension of time requested by petitioner was granted because of time lost owing to rifle fire on the range during the period from September 26 to November 10, 1938, and no liquidated damages were asserted (R. 33).

On April 10, 1939, petitioner appealed to the Secretary of Navy in connection with his claim for additional compensation (R. 33). On April 27 ,1939, petitioner executed a release of all claims arising under the contract, specifically excepting, however, his "claim for the cost of constructing the work as ordered by the officer in charge and varying from the shape and dimensions designated

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on the contract plan, and for which additional work $3,479.84 is claimed in lieu of the sum of $255.20 proffered by Change 'A', plus other expense incident thereto, all not to exceed a total amount of $4,000.00" (R. 33–34). On June 30, 1939, the Secretary of Navy denied petitioner's claim for extra compensation (R. 33). Petitioner thereafter brought suit in the Court of Claims to recover the sum of $4,000 (R. 20). This sum allegedly represented the cost to petitioner of the claimed additional work plus incidental expenses (R. 18). The Court of Claims held that petitioner was not entitled to recover, and accordingly dismissed the petition (R. 34).

ARGUMENT

Petitioner contends that he contracted with the Government to perform a precise quantity of embankment work for $2,500 and that, since a larger quantity was performed, he was entitled to be paid $4,000 as "cost for the additional work performed" (Pet. 2). His argument is based on Article 3, "Changes," of his standard form contract.[5] The dispositive answer to this contention

[5] As shown above, *supra*, p. 7, petitioner, on April 27, 1939, released all claims against the Government in connection with this work except the "* * * claim for the cost of constructing the work * * * varying from the shape and dimensions designated on the contract plan * * *." Petitioner is, of course, bound by this release and cannot in this suit go beyond the claim specifically reserved (Pet. 5–6, 8). *Carlin Construction Co.* v. *United States*, 92 C. Cls. 280, 304–305; *Bein* v. *United States*, 101 C. Cls. 144, 159–160.

is that the work performed was within the contemplation of the contract and compensable at the contract unit price, and that there was no "change" within the meaning of Article 3. Accordingly, we submit that the Court of Claims correctly dismissed the suit.[6]

1. The specifications attached to the invitation for bids, which gave rise to the formation of the contract here involved, stated that "approximately $2,500 is available for the work and the *quantity* of filling which will be done is *dependent* upon the unit price for the work" and that "the work shall be located * * * approximately as shown" (R. 25). [Italics supplied.] The item on which bids were requested specified: "Price per cubic yard, borrow pit measurement, for the fill in place * * *" (R. 26). Petitioner submitted a bid of 20 cents per yard for the item described, but qualified it with the condition that not less than $2,500 be paid; this bid was accepted by the Government (R. 26).

The drawings and specifications indicated the use of approximately 9,000 cubic yards of fill for the proposed embankment work, a quantity which, at petitioner's bid figure of 20 cents per cubic

[6] We fail to understand petitioner's assertion that the Court of Claims erred "in failing to find the facts responsive to the petition, e. g., the contract" (Pet. 8). The contract provisions about which the case centers were, of course, before the court below and form part of the record herein (R. 2–12). The entire opinion of the court below is directed to the primary issue, namely, the interpretation of the contract.

yard, would yield a total contract remuneration of only $1,800. Since petitioner and the Government had agreed upon the expenditure of $2,500 at 20 cents per cubic yard, which would require an excavation of approximately 12,500 cubic yards, discussions took place as to the disposition of the additional yardage to be excavated "* * * in order to use the entire amount of money allotted for the project * * *" (R. 29–30). It was decided that the additional yardage would be used by increasing the height of the embankment by two feet and by broadening its base to give a slope of 83% (R. 29–30).

As the court below correctly observed, "Neither the language of the contract and plans and specifications nor the circumstances surrounding the transaction sustain * * *" petitioner's contention that the additional excavation thus determined was a "change" compensable under Article 3 or one which warranted any revision in the contract provisions for petitioner's remuneration.[7]

[7] The petition for a writ of certiorari herein does not state the amount of additional compensation sought. In the court below, petitioner sought to recover $4,000 in addition to the $2,500 which he had received under the contract (R. 20–21). This sum was said to be in lieu of the $255.20 which was awarded him by Change Order "A" and computed by applying the contract unit price to 1,276 cubic yards, considered by the Government to be the actual excess yardage excavated (R. 33–34). Petitioner's theory, that he undertook to excavate 7,000 cubic yards of fill for $2,500 and to receive 20 cents per cubic yard for excavation in excess of this quantity,

On the contrary, the arrangements which led to the final determination as to the elevation and base of the embankment were designed to enable petitioner, at his insistence, to obtain the full $2,500 available for the work and were thus primarily for his benefit.[8] The court below correctly determined that this was a contract to erect an embankment containing sufficient yardage to yield petitioner $2,500 at 20 cents per cubic yard.

2. Even assuming, *arguendo,* that the Government's contracting officer had here issued a change order which required a change in contract compensation with regard to additional yardage excavated, petitioner cannot succeed. First, since the alleged "change" contended for by the peti-

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does not support the amount claimed by petitioner in the court below, in that it only yields an additional amount of $1,355.20. In this connection, it should be noted that this contention as to the interpretation of the contract would convert petitioner's bid unit price of 20 cents per cubic yard into an actual price of 35 cents per cubic yard for the 7,000 cubic yards which petitioner alleges to have been required by the contract. Petitioner in reality is asking for a reformation of his contract which would yield him $6,500 for the work which he contracted to perform for $2,500, changing his bid unit price from 20 cents to 47 cents. There is, of course, no basis here present for reformation of the contract. *Columbian National Life Insurance Co.* v. *Black*, 35 F. 2d 571, 573 (C. C. A. 10); *Restatement of Contracts*, Sections 504, 505: Williston, *Contracts* (Rev. Ed.), Section 1548.

[8] As remarked by the court below, petitioner attached the $2,500 condition to his bid because he believed that it would have been unprofitable to move the necessary machinery to the job for any smaller amount (R. 37).

tioner would have involved, on petitioner's theory, an additional expenditure of more than $500, it would have required approval of the Chief of the Bureau of Yards and Docks, Navy Department, after consideration and report by a board appointed by him in accordance with General Provision 27 of the contract (R. 11). No such board was here appointed nor was any decision made by the Chief of the Bureau of Yards and Docks. Second, in connection with the final arrangements for the embankment work on September 8, 1938, if petitioner had been denied additional remuneration for a compensable change within Article 3 of his contract by a decision of the proper contracting officer, petitioner stands in the position of having accepted such decision since he failed to appeal to the head of the department within 30 days as provided by Article 15 of his contract.[9] This failure to follow contract procedure would, of course, bar petitioner's access to the courts. *United States* v. *Callahan Walker Company*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735.

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[9] As to petitioner's appeal on April 10, 1939, after the completion of the work, see Government's Br. in Opp., pp. 8–11 in *Union Paving Co.* v. *United States*, No. 106, this Term.

CONCLUSION

The decision below is clearly correct and there is no occasion for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1947.

APPENDIX

1. The advertisement for bids provided in part:

> 1–02. *General description.*—The work includes clearing borrow pit site and earthwork. Approximately $2500 is available for the work and the quantity of filling which will be done is dependent upon the unit price for the work.
>
> 1–03. *Location.*—The work shall be located at the Naval Academy (Rifle Range), Annapolis, Md., approximately as shown. The exact location will be indicated by the officer in charge.

2. The item on which bids were requested was set out as follows:

> *Item 1.*—Price per cubic yard, borrow pit measurement, for the fill in place, complete in accordance with the drawing and specifications.

3. The contract here involved provided in pertinent part:

> ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for constructing an extension and making certain repairs to an existing embankment behind the 600–Yard Range butt, at the Naval Academy (Rifle Range), Annapolis, Maryland, as contemplated by item 1, paragraph 3–02 of specification No. 8796, for the consideration of twenty cents ($0.20) per cubic yard, borrow pit measurement, for the fill in place, in strict accordance with the specifications, schedules, and drawings, all of which are

made a part hereof and designated as follows: Said specification No. 8796, General Provisions, and drawing mentioned therein.

The work under this contract contemplates the expenditure of approximately $2,500.

The work shall be commenced within 10 calendar days after date of receipt of notice to proceed, and shall be completed within 90 calendar days from the date of receipt of notice to proceed, subject to the provisions of paragraph 1–06 of said specification.

* * * * *

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be

determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work so directed.

4. Article 27 of the General Provisions provided:

> 27. *Adjustments in price and time owing to changes.*—In case of changes as contemplated by article 3 of the contract, the cost thereof, and any change in the time for performance involved shall be estimated by the officer in charge and reported by him to the Chief of the Bureau of Yards and Docks. If his estimate of cost exceeds $500, estimates of cost and time shall be made by a board appointed by or under the direction of the Chief of the Bureau of Yards and Docks, consisting of two officers or other representatives of the Government and one representative nominated by the contractor, which estimates shall be reported to the chief of said bureau. The Chief of the Bureau of Yards and Docks as contracting officer, shall in all cases determine the change, if any, in price and time involved, subject to the right of appeal provided for in article 15 of the contract. In determining the change in price the cost of additions shall be the estimated actual cost to the contractor and the cost of deductions shall be the estimated cost to the contractor as of the time when the contract was made. In arriving at the amount of the change, due allowance shall be made in the discretion of the contracting officer for overhead and general expense, plant charges, and other expense items of a similar nature. To all estimates of cost 10 percent shall be added for contractor's profit.

5. The specifications provided in part:

> 1.06. *Time for completion.*—The work shall be completed within 90 calendar days after date of receipt of notice to proceed

therewith, except that for each working day or part thereof on which work is not done because of firing on the rifle range at times other than those listed in the firing schedule given hereinafter (paragraph 1–14), the time for completion will be extended an equal time.

* * * * *

2–02. *Borrow pits.*—Material for the fill shall be excavated from the borrow pits indicated. Borrow pit excavation shall be started at the ends towards Little Carr's Creek at elevation +12.00 for borrow pit in rear of new embankment and at +15.00 for borrow pit in front of existing embankment, from which points it shall be graded back uniformly covering the entire width of the pits on a slope of one foot in 100 feet. The backs of the borrow pits shall be graded on a 2 to 1 slope to the existing grades.

* * * * *

2–05. *Measurement.*—Fill will be measured by sections of the borrow pits taken by the Government before and during the progress of the work, in the presence of the contractor or his authorized representative, if desired. Material taken from the borrow pits for use in construction of temporary work outside of the embankments, will be deducted from the quantities for which payment will be made.

U. S. GOVERNMENT PRINTING OFFICE: 1947